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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D., 1940.

H. S. GRAY, ET AL., PETITIONERS,

V.

MYRTA BLIGHT, ADMINISTRATRIX OF THE
ESTATE OF H. E. BLIGHT, DECEASED,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND
SUPPORTING BRIEF.

T. R. BOONE,

Counsel for the Petitioners.

EARL W. WILSON,
Denver, Colorado,

T. R. BOONE,
CHARLES C. McDUGALD,
KIMBERLY PERRY,

Wichita Falls, Texas,

Counsel for Petitioners.

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**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT AND
SUPPORTING BRIEF.**

To the Honorable Charles Evans Hughes, Chief Justice
of the United States and the Honorable Associate
Justices of the Supreme Court of the United States:

Now come H. S. Gray and Margaret Gray, individually, and H. S. Gray as next friend for John Herbert Gray and Peggy Gray, minors, and present herewith their Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit, to review its decision in the above entitled and numbered cause, and submit herewith the necessary printed copies of the Transcript of the record filed in the Circuit Court of

(Italics in Application are the writer's.)

Appeals and properly certified copy of the proceedings in that Court and attach hereto a Supporting Brief.

As grounds for the issuance of said most gracious Writ, your Petitioners respectfully show:

I.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This entire cause may be cogently summarized by the question:

“Does the mere *failure* of the legislature of a State of this Union to affirmatively abrogate the old and antiquated doctrine ‘*actio personalis moritur cum persona*’ amount to such a declaration of public policy as to *forbid* the bringing of an action for personal injuries in such State against the estate or personal representative of a deceased tort feisor—even though such cause of action survives under the law of the State within whose jurisdiction the tort was committed?”

Pleadings of Petitioners.

The Petitioners instituted this Cause as Plaintiffs against Respondent as Defendant, in the District Court of the United States for the District of Colorado, seeking to recover:

- (a) Damages for personal injuries;
- (b) Damages to the automobile of the Petitioner, H. S. Gray.

In their Complaint, Petitioners alleged that such damages resulted from a collision on August 22, 1938, between the automobile of Petitioner H. S. Gray and an automobile owned, driven and operated by H. E. Blight; *that the collision occurred near the town of Winnemucca, in Nevada*, as the direct and proximate result of the negligence of the said H. E. Blight in the management, op-

eration and control of his automobile (R. 5-6); that Petitioners were each and all residents and citizens of the State of Texas (R. 4), and at the time of the collision H. E. Blight was a resident and citizen of the State of Colorado (R. 4-5).

Petitioners further alleged that subsequently—on or about October 6, 1938, H. E. Blight died, and that, thereafter, on November 2, 1938, Myrta Blight, also a citizen and resident of the State of Colorado, was duly appointed and qualified as Administratrix of the Estate of H. E. Blight, deceased, and was acting in such capacity at the time of the filing of such suit (R. 5), but that all of said damages claimed accrued, though were not fully ascertainable, prior to the death of H. E. Blight on October 6, 1938.

They further alleged that such causes of action each survived the death of H. E. Blight under the law of the State of Nevada, and specifically plead the pertinent provisions of the Nevada law (R. 9-10).

The damages sought were in the aggregate sum of \$21,750.00, of which \$1,050.00 was for damages to Petitioner H. S. Gray's automobile; the remainder for personal injuries inflicted upon the Petitioners, as follows:

- (a) \$3,700.00 to H. S. Gray, individually (which includes an item of \$700.00 for doctors' and nurses' bills incurred in the treatment of himself and other members of his family);
- (b) \$3,500.00 to Margaret Gray;
- (c) \$3,500.00 to John Herbert Gray, a minor;
- (d) \$10,000.00 to Peggy Gray, a minor.

In none of the above itemized damages sought was there any element of exemplary damages; they all being in the nature of pecuniary damages sought for actual injuries sustained.

Pleadings of Respondent.

Respondent filed only a Motion to Dismiss the action on the ground that the Complainant failed to state a claim against her upon which relief could be sought in Colorado (R. 12).

Action of the Trial Court.

The Honorable Trial Court sustained such Motion by Respondent and dismissed Petitioners' Cause of Action in its entirety (R. 12 and 21), and Petitioners having refused to amend or plead further (R. 20-21) duly perfected their appeal to the Circuit Court of Appeals for the Tenth Circuit (R. 21-22).

Decision of the Appellate Court.

The Circuit Court of Appeals *affirmed* the action of the Trial Court in dismissing Petitioners' Cause *in so far as the same sought a recovery for personal injuries against the Estate of the said H. E. Blight* (R. 31), (and modified the Judgment of the Trial Court in so far as the Petitioner H. S. Gray's action was concerned; and remanded this part of the Judgment with instructions to overrule the Motion of Respondent as to the claim of H. S. Gray for damages to the said car)—stating as grounds therefor:

(1) That the State of Colorado does not permit the representative of a deceased tortfeasor to be sued upon a claim for damages for personal injuries (inflicted by the deceased tortfeasor during his lifetime)—even though such claim for damages survived under the law of the place of wrong, i. e.: under the Law of Nevada (R. 27);

(2) That to permit the prosecution of an action for personal injuries against the representative of a deceased tortfeasor is repugnant to the public policy of the State of Colorado, even though such cause of action arose and survived under the law of a sister State (R. 30).

The Opinion of the Honorable Circuit Court of Appeals may be found in 112 F. (2d) 696.

Relevant Statutes and Constitutional Provisions of the States of Nevada and Colorado involved in this cause.

(a) Nevada:

“Sec. 1. Causes of action, whether suit has been brought upon the same or not, in favor of the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation or to the person of the injured party, shall not be abated by reason of his death nor by reason of the death of the person against whom such cause of action shall have accrued; but in case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party and against the person, receiver, or corporation liable for such injuries, and his or its legal representatives; and so surviving such cause of action may be hereafter prosecuted in like manner and with like legal effect as would a cause of action for injuries to or destruction of personal property. The court or jury in every such action may give such damages, pecuniary and exemplary, as it shall deem fair and just.”

(Nevada's Compiled Laws, 1929, 1938 Pocket Part for Volume 1, Sections 240-241—Cause of Action for Injuries Not to Abate by Reason of Death.)

(b) Colorado:

1. “That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay.”

(Constitution, Art. 2, Sec. 6, Compiled Laws of Colorado of 1921, pp. 34 to 83.)

2. "The judicial power of the State as to all matters of law and equity, except as in the Constitution otherwise provided, shall be vested in the Supreme Court, District Courts, County Courts and such other courts as may be provided by law; in counties and cities and counties having a population exceeding one hundred thousand, exclusive original jurisdiction in cases involving minors and persons whose offenses concern minors may be vested in a separate court now or hereafter established by law."

(Constitution, Art. 6, Sec. 1, Compiled Laws of Colo. 1921, pp. 34 to 83.)

3. "The District Courts shall have jurisdiction of all cases both at law or in equity, and such appellate jurisdiction as may be conferred by law. They shall have original jurisdiction to determine all controversies upon relation of any person on behalf of the people, concerning the rights, duties and liability of railway, telegraph or toll road companies, or corporations."

(Constitution, Art. 6, Sec. 11, Compiled Laws of Colorado, 1921, pp. 34 to 83.)

4. "All actions in law, whatever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, and actions brought for the recovery of real estate, shall survive to and against executors, administrators and conservators.

(Colo. Stats. Ann. Sec. 247, Chapt. 176, 1935).

5. "An action shall not abate by the death or other disability of a party, or by the transfer of any interest herein, *if the cause of action survive or continue*. In case of the death or other disability of a party, the Court on motion may allow the action be continued by, or against, his representative or successor in interest."

(Sec. 15, Code of Civil Procedure, Ch. 1, Compiled Laws Colo., 1921.)

II.

SPECIFICATION OF JURISDICTIONAL BASIS TO THE HONORABLE SUPREME COURT OF THE UNITED STATES.

This Petition for Writ of Certiorari is made under the authority of Title 28, Section 347a, U. S. C. A. (Judicial Code 240); and that portion of Rule 38, Paragraph 5 of the Rules of the Supreme Court of the United States providing jurisdiction:

“(b) Where a circuit court of appeals has—decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court - -”;

The date of Judgment to be reviewed is June 10, 1940; but the Circuit Court of Appeals considered Petitioners' Motion for Rehearing, filed on the 5th day of July, 1940 (R. 33-41), and overruled the same on the 12th day of July, 1940 (R. 43), and this Petition for Writ of Certiorari is made to this Honorable Court within ninety (90) days from and after the overruling of said Motion for Rehearing.

III.

QUESTIONS PRESENTED.

(a) Whether or not a cause of action for personal injuries is “property” within the meaning of the “due process” ⁽¹⁾ and “equal protection” ⁽²⁾ clauses of the Federal Constitution; and an adjunct of a public act of the State of Nevada ⁽³⁾ entitled to “full faith and credit” in the State of Colorado. ⁽⁴⁾

-
1. Art. XIV, Amendments to the U. S. Const., Appendix A, page 29.
 2. Art. XIV, Amendments to the U. S. Const., Appendix A, page 29.
 3. Sec. 240-241, Nevada's Compiled Laws, 1929, *supra*, pg. 5, par. (a).
 4. Art. IV, Sec. 1, U. S. Const., Appendix A, page 29.

(b) Whether or not a cause of action for personal injuries survives to and against personal representatives of the deceased party, as a matter of right, as distinguished from the question of procedure;

(c) Whether or not the State of Colorado, by express *constitutional* mandate ⁽¹⁾ creates and ordains courts of general jurisdiction, wherein is guaranteed a speedy remedy for every injury to *person*, property or character - - so long as such cause of action survives under the law of the *lex loci*; ⁽²⁾

(d) Whether or not the State of Colorado *permits* the prosecution of a cause of action for personal injuries against the personal representative of a deceased tortfeasor, where such cause of action arose and survived under the law of a sister state;

(e) Whether or not the enforcement of a cause of action for personal injuries against the estate of a deceased tortfeasor, which arose and survived under the laws of a sister State, is repugnant to the public policy of the State of Colorado.

(f) Whether or not Section 247, Chapter 176, 1935 Colorado Statutes Annotated, ⁽¹⁾ declares the public policy of Colorado to permit the prosecution of certain causes of action against the executor, administrator or conservator of the wrongdoer after his death, but excludes therefrom causes of action for injuries to the person.

IV.

REASONS FOR GRANTING THIS PETITION FOR WRIT OF CERTIORARI.

(a) the decision of the Circuit Court of Appeals herein, affirming the action of the Trial Court in dismissing Petitioners' Causes of Action for personal in-

1. Art. 2, Sec. 6, Const. of Colo., *supra*, pg. 5, par. (b) 1.

2. Sec. 240-241, Nevada's Compiled Laws, 1929, *supra*, pg. 5, par. (a).

juries against the personal representative of the deceased tortfeasor, H. E. Blight, because the same are not permitted by and are offensive to, the public policy of the State of Colorado, even though such causes of action survived under the Law of Nevada, is on an *important* question of local law and is probably in conflict with the applicable local decisions of the State of Colorado; and in this connection Petitioners respectfully state that although the question of whether or not a cause of action for personal injuries would survive the death of the tortfeasor (where such tort was committed in the State of Colorado) has been often before the Courts of Colorado, the same have specifically held only that *the cause of action itself* does not survive under the Law of Colorado, and in no instance have the Courts of such State in any manner indicated that the maintenance of such a cause of action, which in fact survived the death of such tortfeasor under the law of a sister State wherein it was committed, is prohibited by, or in any manner offensive to, the public policy of the State of Colorado.

(b) The decision of the Circuit Court of Appeals herein, as to whether or not a cause of action for personal injuries, which survived under the law of the *lex loci*, may be maintained against the estate or personal representative of a deceased tortfeasor in a jurisdiction other than that of the *lex loci*, wherein no express Constitutional provision, statute or judicial decision provides that such cause of action shall survive, involves an important question of Federal law which has not been but should be settled by this Court; and particularly so, where the cause of action sought to be enforced is one acquired under and as an adjunct to the *public act* of a sister State.

(c) The decision of the Circuit Court of Appeals in holding that a cause of action for personal injuries may not be maintained against the personal representative of a deceased tortfeasor in the State of Colorado, even though such cause of action expressly survived under the law of a sister State (Nevada) is a decision

of a Federal question probably in conflict with the following decisions of this Court;

- (1) *Dennick v. Central Ry. Co.*, 103 U. S. 11.
26 L. Ed. 439.
- (2) *N. P. R. R. Co. v. Babcock*, 154 U. S. 190, 38
L. Ed. 958.
- (3) *Bradford Electric Light Co. v. Clapper*, 286
U. S. 145; 52 Sup. Ct. 571.
- (4) *Ormsby v. Chase*, 290 U. S. 387, 54 Sup. Ct. 211.

WHEREFORE, Petitioners pray that a Writ of Certiorari be granted, directed to the Circuit Court of Appeals for the Tenth Circuit, and in conformity with law, to the end that this cause may be reviewed and determined by this Court and that the Judgment of the Circuit Court of Appeals be reversed in so far as the same affirms the action of the Trial Court in dismissing Petitioners' causes of action for personal injuries against Myrta Blight, administratrix of the estate of H. E. Blight, and that the same be affirmed in so far as it reverses and remands Petitioner, H. S. Gray's cause of action for damages to his automobile, and for such relief as these Petitioners may be entitled to in the premises.

Respectfully submitted,

T. R. BOONE,

Counsel for Petitioners.

EARL W. WILSON,
Denver, Colorado,

T. R. BOONE,
CHARLES C. McDUGALD,
KEARBY PEERY,
Wichita Falls, Texas,
Of Counsel.

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MYRTA BLIGHT, ADMINISTRATOR OF THE
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RESPONDENT.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

I.

OPINION OF THE COURT BELOW.

The Opinion of the Circuit Court of Appeals is set out briefly on page 4 of Petitioners' Application for Writ of Certiorari, and is shown in full at pages 25 to 32 of the record herein.

The official report of same may be found in 112 F. (2d) 696.

II.

JURISDICTION.

1. The date of the Opinion of the Circuit Court of Appeals, the review of which is here sought, is June 10, 1940, and Petition for Rehearing, being duly filed on

July 5, 1940, (R. 33-41) was overruled by the Circuit Court of Appeals, without written Opinion, on July 12, 1940 (R. 43).

2. Statutory provision sustaining the jurisdiction of this Court is Title 28, Section 347a, U. S. C. A. (Judicial Code 240);

3. Jurisdiction of this Court is also based upon a portion of Rule 38, Para. 5 of the Rules of the Supreme Court (effective February 27, 1939) reading:

“(b) Where a circuit court of appeals has - - decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court”;

4. The precise question presented by this Cause has never been before the Honorable Supreme Court, but it is believed that the Opinion of the Circuit Court of Appeals is not harmonious with prior decisions of the Supreme Court and that the following cases sustain the jurisdiction of this Honorable Court:

- (a) *Dennick v. Central Ry. Co.*, 103 U. S. 11, 26 L. Ed. 439.
- (b) *Northern Pacific Ry. Co. v. Babcock*, 154 U. S. 190, 38 L. Ed. 958.
- (c) *Bradford Electric Light Co. v. Clapper*, 286 U. S. 145, 52 Sup. Ct. 571.
- (d) *Ormsby v. Chase*, 290 U. S. 387, 54 Sup. Ct. 211.

III.

STATEMENT OF THE CASE.

A Statement of this Case has heretofore been made in the preceding Petition, under paragraph one (pages

2 to 6), which is hereby adopted and made a part of this Brief.

IV.

SPECIFICATIONS OF ERROR.

1. The Honorable Circuit Court of Appeals erred in failing to hold that a cause of action for personal injuries is property within the meaning of the "due process" clause, ⁽¹⁾ and "equal protection" clause, ⁽²⁾ of the Constitution of the United States of America; and an adjunct of a public act of the State of Nevada entitled to "full faith and credit" in the State of Colorado. ⁽³⁾

2. The Honorable Circuit Court of Appeals erred in failing to hold that the State of Colorado by express self-executing Constitutional Mandate, ⁽⁴⁾ created and ordained courts of general jurisdiction, wherein it guaranteed a remedy for every injury to *person*, property or character - - - so long as such cause of action for same survives under the law of the *lex loci*.

3. The Circuit Court of Appeals erred in holding that the State of Colorado does not permit the prosecution of causes of action for personal injuries against the personal representative of a deceased tortfeasor, where such cause of action arose and expressly survived under the law of a sister State.

4. The Circuit Court of Appeals erred in holding that the enforcement of a cause of action for personal injuries against the personal representative, or estate of a deceased tortfeasor, which arose and expressly survived under the law of a sister State, is repugnant to the public policy of the State of Colorado.

5. The Circuit Court of Appeals erred in holding that Section 247, Chapter 176, of the 1935 Colorado

1. Art. XIV, Amendment to Const. of U. S.—Appendix A, page 29.

2. Art. XIV, Amendment to Const. of U. S.—Appendix A, page 29.

3. Art. IV, Sec. 1, Const. of U. S.—Appendix A, page 29.

4. Art. 2, Sec. 6, Const. of Colo., *supra*, pg. 5 (b) 1.

Statutes Annotated, ⁽¹⁾ declares the public policy of Colorado to permit the prosecution of certain causes of action against the Executor, Administrator or Conservator of the wrongdoer, after his death, but excludes therefrom causes of action for injuries to the person.

V.

ARGUMENT.

In that the Circuit Court of Appeals has affirmed in part the action of the United States Federal District Court of Colorado in dismissing Petitioners' causes of action for failure to state a claim enforceable in the State of Colorado, the allegations pertaining to such causes of action set forth in their Petition must be taken as true on this appeal. (*State of Arizona v. State of Colorado*, 283 U. S. 423; 51 Sup. Ct. 522.)

Petitioners therefore submit authorities and argument in support of the errors assigned, as follows:

Under Detailed Specification of Error No. 1.

It is undisputed that under the Law of the State of Nevada, the State within whose jurisdiction the injuries here complained of were inflicted, a cause of action for personal injuries survives to the person wronged, even upon the death of the wrongdoer; ⁽²⁾ and

It is equally well settled that whether a cause of action survives to or against personal representatives of a deceased party is a question of right and not of procedure.

Gerling v. B. & O. R. R. Co., 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311.

Plimpton v. Mattakeunk Cabin Colony, 6 Fed. Supp. 72.

(1) *Supra*, pg. 6, par. (b) 4.

(2) Nevada Compiled Laws, 1929, 1938 Pocket Part of Vol. 1, Sec. 240-01, *supra*, pg. 5.

Further, this right of action for personal injuries is property.

G. C. & S. F. R. R. Co. v. Cities Service Co., 273 Fed. 946.

Martinez v. Fox Valley Bus Lines, 17 Fed. Supp. 576.

Hence, bearing in mind the well-settled rule that the jurisdiction wherein the tort is committed governs the substantive right of the Petitioners (*Ormsby v. Chase*, 290 U. S. 387; 54 Sup. Ct. 211; 78 L. Ed. 378); it is submitted that Petitioners were vested with a substantive property right enforceable in the District Court of the United States for the District of Colorado, and that the Trial Court and the Honorable Circuit Court of Appeals erred in failing to so hold.

Under Detailed Specifications of Error 2, 3, 4 and 5.

In that the Questions presented by these Assignments are so closely related, Petitioners ask that they be permitted to discuss and argue same under one topical heading.

As a preface to the following Argument, Petitioners adopt the argument and collation of authorities under Assignment of Error No. 1, and submit that they are here seeking to enforce a right legitimately acquired and still belonging to them and which, under the full faith and credit clause of the Federal Constitution (Article 4, Section 1) which declares:

“Full faith and credit shall be given in each state to the public acts - - - of every other state” ⁽¹⁾ - - ;

should be entertained by the Federal District Court sitting in the District of Colorado, unless,

(1) The forum (Colorado) fails to provide a court with jurisdiction of the controversy;

1. Art. IV, Sec. 1, Const. of U. S.—Appendix A, pg. 29.

(2) The forum (Colorado) fails to provide the procedure appropriate for its determination;

(3) The enforcement of the rights conferred under the laws of the State of Nevada would be obnoxious to the public policy of the forum (Colorado)

(*Bradford Electric Light Co. v. Clapper*, 286 U. S. 145) 52 Sup. Ct. 571; 76 L. Ed. 1026, 82 A. L. R. 696.

POINT "A"

The State of Colorado does provide a Court with jurisdiction of this controversy and appropriate procedure necessary for its determination.

In the year 1876 the people of Colorado adopted their present Constitution (Compiled Laws of Colorado, 1921, pages 34 to 84) which had incorporated therein as a part of the Bill of Rights of that State (Article 2, Section 6) the following Constitutional Mandate:

"The courts of justice shall be open to every person and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay."

As a part of the same Constitution, Article 6, Section 1 and Sections 11 to 19, the Courts in which such remedies should be heard were created. ⁽¹⁾

Hence, under the express Constitutional provisions of the State of Colorado, a complete judicature was set up which needed no ancillary legislative enactments to set the same in operation.

As stated in 16 C. J. S., pages 98 to 100, Section 48:

"A provision (of a constitution) is self-executing when it can be given effect without the aid of

1. *Supra*, pg. 6 par. (b) 2 and 3, and see Appendix B, pg. 29.

legislation and there is nothing to indicate that legislation is contemplated in order to make it operative; as stated in *Corpus Juris*, constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed. That a right granted by a constitutional provision may be better or further protected by supplementary legislation does not of itself prevent the provision in question from being self-executing; nor does the self-executing character of a constitutional provision necessarily preclude legislation for the better protection of the right secured, nor legislation in furtherance of the purposes, or of the enforcement of the provision. A self-executing provision does not, however, require any legislation to render it operative, and the legislature may neither abridge, extend, nor otherwise alter such a provision. Only such legislation is permissible as is in furtherance of the purpose, or as will facilitate the enforcement of such provision, and legislation which will impair, limit, or destroy rights granted by the provision is not permissible."

That the above quoted provision of the Colorado Constitution, (Article 2, Section 6,) is self-executing is not open to question; indeed, the Supreme Court of Nebraska in a recent case, decided in 1935, has held a Constitutional provision almost identical in language with that of Colorado, to be self-executing and in a situation most similar to the one presented by the case at *Bar. Wilfong v. Omaha & Counsel Bluff R. R. Co.*, 129 Neb. 600, 262 N. W. 537, at page 541.

As is manifest then, the Constitution of Colorado has, by self-executing Constitutional Mandate, declared and ordered that the Courts of Colorado shall be open to every person in order that a speedy remedy shall be afforded him for every injury to his person, property or character, and has provided a means, the very courts, by which may be obtained a *remedy* in redress of these wrongs;

A "remedy" as used in law, has been almost unanimously defined as the "legal means to recover a right, or to prevent, or obtain redress for a wrong". (Webster's New International Dictionary). "The means employed to enforce a right or redress for an injury." (Bouvier's Law Dictionary, Unabridged, Vol. 2, Third Edition). Hence, the Bill of Rights of the State of Colorado expressly states and directs that the courts (as created by that Constitution) shall be open to every person and the legal means given him to afford redress for every injury to his person, property or character, and it naturally follows, as night the day, that a Court exists in Colorado which has jurisdiction to redress and enforce Petitioners' rights; a Court wherein they are afforded their remedy, for, as is stated in 12 C. J. 700:

"The fundamental purpose in construing a Constitutional provision is to ascertain and give effect to the intent of the framers and of the people who adopted it. The Court, therefore, should constantly keep in mind the object sought to be accomplished by its adoption, and the evils, if any, sought to be prevented or remedied;"

and, as stated in 12 C. J., Sec. 106, page 730:

"- - - A Constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will."

The Honorable Circuit Court of Appeals places great emphasis on the survival statute of the State of Colorado, being Section 247, Chapter 176 of 1935, Colorado Statutes Annotated, which in effect states that all actions in law, save and except trespass for injuries done to the person (and certain others), shall survive to and against executors, administrators and conservators, and seemingly announces that under the wording of this statute, *or rather by reason of the State's failure to provide for the survival of this cause of action*, the same may not be maintained against the personal representative of the

estate of the deceased tort feisor; and, as supporting this conclusion, cites the case of *Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287, which does nothing more than decide that the cause of action does not, under Colorado Law, survive the death of either party; i. e.: if the tort is inflicted in Colorado.

In the *Letson* case, *supra*, the precise point before the Court for decision was whether or not the cause of action itself survived the death of the wrongdoer and Petitioners admit that in so far as the precise point is adjudicated by the Colorado Court, the Federal Courts are bound by the Rules and Decisions Act (28 U. S. C. A., Section 725) to follow same.

However, in the case at Bar, no question exists but that the cause of action, or right of action, now sought to be enforced by the Petitioners, survived under the Law of the *lex loci*, that is, under the Law of the State of Nevada, and as a consequence, Petitioners submit that the case of *Letson v. Brown*, *supra*, together with the statute construed therein, cannot be and is in no way material to the present litigation.

Apparently, the Honorable Circuit Court of Appeals is confused by the applicability of Section 390, subsection (b) of the Restatement of Conflict of Laws, that:

“If a claim for damages for injury survives the death of the injured person or the wrongdoer, as the case may be, by the law of the place of the wrong, recovery may be had upon it by or against the representative of the decedent, provided the law of the forum permits the representative of the decedent to sue or to be sued on such claim. Without such power created by the law of the state of suit, no recovery can be had;”

and assumes that because no *statute* of Colorado expressly provided for the maintenance of this action, no court has ever been created to hear this cause.

Apparently, as sustaining this contention, the Circuit Court of Appeals asserts that the Common Law of England, under which such a cause of action as this does not survive, was adopted by the State of Colorado by statute, as follows:

“The Common Law of England, so far as the same is applicable and of a general nature and all acts and statutes of the British Parliament made in aid of or to supply the defense of the Common Law prior to the Fourth Year of James 1 - - - and which are of a general nature and not local to that kingdom, shall be the rule of decision and shall be considered as of full force until repealed by legislative authority.” ⁽¹⁾

That the State of Colorado adopted the Common Law of England “so far as applicable and of a general nature” the Petitioners readily admit, but they insist that such adoption, whether before the Enactment of the present Constitution or afterwards, cannot in any way operate to limit, abridge, or destroy the self-executing and mandatory provision of the Constitution of Colorado that the courts of that State, as created by the very Constitution itself, shall be open to every person and a speedy remedy afforded every person for every injury to his person, property or character; as stated in 16 C. J. S., page 96, Section 44:

“- - - the Common Law is repealed by the Constitution to the extent that it is inconsistent therewith.”

It is apparent then, that this statutory enactment caused the Common Law to become operative in the State of Colorado, but only to the extent that it was consistent with and in accord with the Constitutional mandate of the people of Colorado. Any phase thereof which operated in derogation of the Constitutional right of every person to seek his remedy in the courts of Colorado, for his injuries, whether to his person or

(1. Sec. 1, Ch. 159, 1935 Colorado Statutes Annotated.)

otherwise, of necessity did not become a part of the Rule of Decision in the State of Colorado.

This Honorable Court is well aware of the origin of the Common Law maxim "actio personalis moritur cum persona" and knows that the same grew out of an archaic concept of punishment which, long prior to the adoption of the Constitution by the people of Colorado was utterly abrogated and the enlightened and correct theory of recompense was adopted in its stead, and;

As has been previously stated, the people of Colorado; long after the substitution of the recompense theory, by Constitutional mandate created courts of general jurisdiction and adopted as a part of their basic law that those very courts shall be open to every person who seeks a redress for every injury to his person, property or character.

Certainly appropriate procedure for the determination of the rights now owned by Petitioners is provided by Section 136, Chapter 176, Vol. 4, 1935 Colorado Statutes Annotated, that,

"Executors, administrators, guardians and conservators shall, in their own names and official capacities, by virtue of their office as such, be allowed to prosecute and defend on behalf of the wards or estates represented by them. - - -. In all actions against - - - estates of deceased persons, service of process shall be made upon the executors, administrators; - - - as the case may be."

Hence, it is obvious that under this Statute, representatives of the deceased estate are expressly authorized and empowered to defend any and all actions against the estate, *if a cause of action survives the death of a person whose estate they represent.*

In brief resumé, then, the State of Colorado has expressly authorized and empowered the Respondent herein to defend the cause of action here sought to be enforced, and has further provided that process shall

be served upon her. Further, the State of Colorado has, by Constitutional provision, created courts of general jurisdiction and declared that these courts shall be open to every person to seek a remedy for injuries to his person, property or character, and Petitioners respectfully submit that it is clear under the foregoing Constitutional and Statutory Provisions, that a court exists in Colorado wherein this action, which survived under Nevada Law, may be heard and adjudicated, and that the survival statute of Colorado is in no way pertinent to this present litigation.

POINT "B"

The Cause of Action here sought to be maintained by the Petitioners is in no way repugnant to the public policy of the State of Colorado.

As stated by Mr. Justice White, speaking for the majority of the United States Supreme Court in the case of *N. P. R. R. Co. v. Babcock*, 154 U. S. 190, 38 L. Ed. 958, to justify a court in refusing to enforce a right of action which accrued under a Law of another State, because against the public policy of the State of the forum, it must appear that it is against the good morals or natural justice or that, for some other such reason, the enforcement of it will be prejudicial to the general interest of the State's own citizens.

The public policy of a given State must be determined by the Law of the State in which a cause of action is asserted, as made known by its Constitution, Statutes and Judicial Decisions. (*Girard Will Case*, 43 U. S. (2 How.) 127, 11 L. Ed. 205.)

It is obvious under the foregoing discussion contained under Point "A" hereof, that in no event does the Constitution of the State of Colorado in any way declare the public policy of the State of Colorado to be repugnant to the bringing of that cause of action here sought by the Petitioners. To the contrary, the Constitution of Colorado guarantees Petitioners their right

to seek redress for their injuries, be they to their person, property or character, and this without limitation as against whom the cause of action may be asserted.

While a State may deny a remedy in its Courts upon a tort arising in another jurisdiction (*Dougherty v. American McKenna Process Co.*, 255 Ill. 369, 99 N. E. 619), the fundamental public policy is that rights lawfully vested should be everywhere maintained and that only exceptional circumstances should cause one State to refuse to enforce a right acquired in another. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198; and particularly so where such right is acquired by virtue of a "public act" of the State in which the cause of action accrued. (Constitution of the United States, Article 4, Section 1.)

Where the policy of a State has been positively expressed in a statute, as was done in the case of *Dougherty v. American McKenna Process Co.*, *supra*, that policy must prevail, but it is submitted that Section 247, Chapter 176, of the 1935 Colorado Statutes Annotated, in no way positively expresses or declares the public policy of Colorado to prohibit the prosecution of causes of action for injuries to the person against the estate or personal representative of the deceased tortfeasor.

To the contrary, Section 15 of the Code of Civil Procedure, Chapter 1 of the Compiled Laws of Colorado of 1921, expressly provides:

"An action shall not abate by the death or other disability of a party, or by the transfer of any interest herein, *if the cause of action survive or continue*. In case of the death or other disability of a party, the Court on motion may allow the action be continued by, or against, his representative or successor in interest."

Further, Section 1, Chapter 176, Vol. 4, of the 1935 Colorado Statutes Annotated, provides in part:

“Whenever any person having title to any real estate or property having the nature or legal character of real estate or personal estate, undisposed of, or not otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to a kindred male and female, *subject to the payment of his debts, etc.*” ⁽¹⁾

Under the above Statutes, Petitioners submit that the public policy of Colorado militates against that interpretation placed thereon by the Honorable Circuit Court of Appeals.

In the cases of *Burg v. Knox*, 334 Mo. 329, 67 S. W. (2d) 96 (1933) and *Parsons v. American Trust & Banking Company*, 168 Tenn. 49, 73 S. W. (2d) 698 (1934), a cause of action which survived under the laws of a sister State and in which the injuries occurred, was sought to be enforced in the States of Missouri and Tennessee, neither of which provided, by statute or otherwise, for the survival of an action for personal injuries not resulting in death. However, in both of such States in which such causes of action were sought to be enforced, a *revival statute* had been enacted by the Legislature in substantially the following language:

“Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, shall not abate by reason of his death, or by reason of the death of the person against whom such cause of action shall have accrued.”

In each of such cases the defense plead was that the “public policy” of the state of the forum was repugnant to the maintenance of such action because no *survival statutes* were contained in the laws of the States of the forum.

Clearly, in both of these cases—had the injury occurred within the jurisdiction of the State of the forum

and no action brought prior to the death of either party, no action could thereafter have been entertained by reason of the fact that the cause of action itself would not have survived, as is true in the State of Colorado. However, in each case a recovery was allowed and the Supreme Courts of each of the above States, in commenting upon this defense of "public policy" stated:

"No conflict raising the barriers of public policy can exist between statutes so nearly alike."

Is not the same reasoning applicable in the case at Bar? Had the cause of action presented by the case at Bar been instituted prior to the death of H. E. Blight, the cause of action surviving under the Laws of the State of Nevada, Respondent could have been brought in under the express provision of Section 15 of the Code of Civil Procedure.

How then, can it be said that the mere failure of the State of Colorado to expressly provide that such cause of action shall survive by Legislative Enactment, sets forth a public policy prohibiting the maintenance of an action for injuries to the person against the estate or personal representative of the deceased tortfeasor in the State of Colorado - - - where such survived under the law of a sister State.

Certainly, Section 247 of Chapter 176 of the 1935 Colorado Statutes Annotated is not a *prohibitive* statute and does *not attempt* to go to the power of an executor, administrator or conservator to sue or be sued. In the cases of *Chubbuck v. Holloway*, 182 Minn. 255, 234 N. W. 314, 868, and *Kertson v. Johnson*, 185 Minn. 591, 242 N. W. 329, 85 A. L. R. 1, suit was brought in Minnesota for injuries to the person incurred in another jurisdiction, wherein the cause of action for such injuries to the person survived. However, it was contended that such causes might not be maintained because of Article 9656, G. S. Minn. 1923 (Art. 8174, G. S. Minn. 1913), which provided:

“A cause of action arising out of an injury to the person dies with the person of either party, except as provided in Art. 8175. All other causes of action, whether arising on contract or not, survive to the personal representative of the former and against those of the latter.”

In overruling such contention, the Supreme Court of Minnesota states:

“Under the Wisconsin Statute, *Plaintiff has a vested right and the uniform interstate enforcement of vested rights is desirable.* - - - *The public policy of the forum cannot, with any regard for logic or general principles of justice, be violated by the enforcement of a vested right created by the law of a foreign state, or by the fact that the law which created it differs in respect to some debatable question of internal policy from the corresponding law of the forum. Especially is this so when there is, as here, nothing repugnant to good morals and no violation of fundamental principles of justice.* While the Wisconsin statute is different than our law, it is not so hostile to the policy reflected in our statutes and judicial records as to cause us to decline jurisdiction.

“Under our laws, a person’s property passes to his heirs upon his death, but the property so passes to the heirs subject to decedent’s debts. This means all debts. (*Chubbuck v. Holloway, supra*, and *Kertson v. Johnson, supra*).”

Certainly, then, under the Statute Law of Colorado, which is in effect identical with that of the State of Minnesota—no such public policy is manifest as would be offended by the maintenance of the action here sought.

In the case of *Northern Pacific R. R. Co. v. Babcock, supra*, this Honorable Court held that even though the State of the forum expressly limits the amount of recovery for injuries resulting in death, nevertheless,

where the injuries giving rise to such cause of action were sustained under the law of a sister State giving a right of action for all such damages as under the circumstances were just, the law of the *lex loci* governed and the limitation contained in the law of the *lex fori* was inapplicable.

In conclusion, the most significant fact bearing upon the public policy of the State of Colorado is found in the many cases decided by the courts of that state themselves, wherein Section 247 of Chapter 176 of the 1935 Colorado Statutes Annotated is construed:

Kelley v. Union Pac. Ry. Co., 16 Colo. 455, 27 Pac. 1058 (1891).

Munal v. Brown, 70 Fed. 967 (C. C. Colo. 1895), a decision by Judge Hallett;

Letson v. Brown, 11 Colo. App. 11, 16; 52 Pac. 287 (1898).

Mumford v. Wright, 12 Colo. App. 214, 55 Pac. 744 (1898).

Lee v. City of Fort Morgan, 77 Colo. 135, 138; 235 Pac. 348 (1925).

Clapp v. Williams, 90 Colo. 13, 5 P. (2d) 872 (1931).

Micheletti v. Moidel, 94 Colo. 587, 591, 32 P. (2d) 266 (1934).

Stanley v. Petherbridge, 96 Colo. 293, 42 P. (2d) 609 (1935).

Although each of these cases adheres to the doctrine that an action for personal injuries may not be maintained against the estate or personal representative of the deceased tortfeasor, where the cause of action or the injuries arose, or were inflicted within the jurisdiction of the State of Colorado, in not one of these opinions is it even remotely indicated that such doctrine is founded on the question of public policy, hence it is submitted that there is no adequate basis for the Honorable Circuit Court of Appeals' conclusion that

to allow the maintenance of a cause of action for personal injuries against the estate, or personal representative of a deceased tortfeasor would be obnoxious to the public policy of Colorado. *Bradford Electric Light Company v. Clapper, supra.*

The question involved in the Petition for Certiorari is important. Petitioners have been grievously injured and are without other legal remedy than that presented by the case at Bar. Further, the precise question presented by this Petition is open and has never been decided by the State of Colorado, or by the Honorable Supreme Court of the United States.

It is important that when a litigation such as that presented by the case at Bar again arises, the party litigants may have some rule whereby they may govern their actions. Only this Court can resolve the confusion which exists with regard to the question of law presented by the case at Bar.

The Circuit Court of Appeals has denied to these Petitioners a valuable property right and it is earnestly submitted that they are entitled to a review of this Case by the Honorable Supreme Court of the United States.

Respectfully submitted,

T. R. BOONE,

Counsel for the Petitioners.

EARL W. WILSON,
Denver, Colorado,

T. R. BOONE,
CHARLES C. McDUGALD,
KEARBY PEERY,
Wichita Falls, Texas,

Counsel for Petitioners.

APPENDIX "A"

Constitution of the United States.

Article IV, Sec. 1:

"1. Public acts, records and proceedings of States—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Article XIV, Amendments to the Constitution of the United States, Section 1:

"1. Citizenship defined—Privileges of citizens.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

APPENDIX "B"

Constitution of the State of Colorado. (Compiled Laws of Colorado of 1921.)

Article 6.

Sec. 11: "Jurisdiction—The district court shall have original jurisdiction of all causes both at law and in equity, and such appellate jurisdiction as

may be conferred by law. They shall have original jurisdiction to determine all controversies upon relation of any person on behalf of the people, concerning the rights, duties and liabilities of railroad, telegraph or toll-road companies or corporations."

Sec. 12: "Judicial districts—Term of Judges—The state shall be divided into judicial districts, in each of which there shall be elected by the electors thereof, one or more judges of the district court therein, as may be provided by law, whose term of office shall be six years; the judges of the district courts may hold courts for each other, and shall do so when required by law, and the general assembly may by law provide for the selection or election of a suitable person to preside in the trial of causes in special cases."

Sec. 13: "Judicial districts—Until otherwise provided by law, said districts shall be four in number, and constituted as follows, viz:

First District—The counties of Boulder, Jefferson, Gilpin, Clear Creek, Summit and Grand.

Second District—The counties of Arapahoe, Douglas, Elbert, Weld and Larimer.

Third District—The counties of Park, El Paso, Fremont, Pueblo, Bent, Las Animas and Huerfano.

Fourth District—The counties of Costilla, Conejos, Rio Grande, San Juan, La Plata, Hinsdale, Saguache and Lake."

Sec. 15. "Election of judges—Term—The judges of the district court first elected shall be chosen at the first general election. The general assembly may provide that after the year eighteen hundred and seventy-eight, the election of the judges of the supreme, district and county courts, and the district attorneys, or any of them, shall be on a different day from that on which an election is

held for any other purpose, and for that purpose may extend or abridge the term of office of any such officers then holding, but not in any case more than six months. Until otherwise provided by law, such officers shall be elected at the time of holding the general elections. The terms of office of all judges of the district court, elected in the several districts throughout the state, shall expire on the same day; and the terms of office of the district attorneys elected in the several districts throughout the state shall, in like manner expire on the same day."

Sec. 16. Qualifications of district judges—No person shall be eligible to the office of district judge unless he be learned in the law, be at least thirty years old, and a citizen of the United States, nor unless he shall have resided in the state or territory at least two years next preceding his election, nor unless he shall, at the time of his election, be an elector within the judicial district for which he is elected; Provided, That at the first election, any person of the requisite age and learning, and who is an elector of the territory of Colorado, under the laws thereof at the time of the adoption of this constitution, shall be eligible to the office of judge of the district court of the judicial district within which he is an elector.

Sec. 17. Terms of court—The time of holding courts within the said district, shall be as provided by law, but at least one term of the district court shall be held annually in each county, except in such counties as may be attached, for judicial purposes, to another county wherein such courts are so held. This shall not be construed to prevent the holding of special terms under such regulations as may be provided by law.

Sec. 18. Compensation of judges—The judges of the supreme and district courts shall each receive such salary as may be provided by law; and

no such judge shall receive any other compensation, perquisite or emolument for, or on account of, his office, in any form whatever, nor act as attorney or counsellor at law.

Sec. 19. Clerk of district court—There shall be a clerk of the district court in each county wherein a term is held, who shall be appointed by the judge of the district, to hold his office during the pleasure of the judge. His duties and compensation shall be as provided by law, and regulated by the rules of the court."

Statutes of Colorado, Section 1, Chapter 176, Vol. IV, 1935 Colo. Stats. Annotated.

(Sec. 5151 Compiled Laws of Colo. 1921.)

"Descent of property of intestate—Sec. 1. Whenever any person having title to any real estate or property having the nature or legal character of real estate, or personal estate, undisposed of or not otherwise limited by marriage settlement, shall die intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, *subject to the payment of his debts*, also subject to sale or mortgage when it shall appear to the court to the best interests of the estate of such deceased person and the persons in interest therein, in the following course and manner, namely: If such intestate leave a husband or wife and children, or the descendants of children him or her surviving, one-half of such estate shall descend to such surviving husband or wife, and the residue thereof to such surviving children and descendants of children as hereinafter limited; if such intestate leave a husband or wife, and no child nor descendants of any child, then the whole of the estate of such intestate, real and personal, shall descend to and vest in such surviving husband or wife as his or her absolute estate, subject to the payments of debts as aforesaid. Dower and the tenancy by curtesy are abol-

ished, and neither husband nor wife shall have any share in the estate of the other, save as herein provided.

“Except in the cases above enumerated, the estate of every intestate shall descend and be distributed as follows:

FIRST—To his children surviving, and the descendants of his children who are dead, the descendants, collectively, taking the share which their parents would have taken if living.

SECOND: If there be no children, nor their descendants then to his father and mother share and share alike; if there be no father, then to his mother; if there be no mother, then to the father; if there be no father or mother, then to the brothers and sisters, and to the descendants of brothers and sisters who are dead, the descendants, collectively taking the share of their immediate ancestors, in equal parts.

THIRD: If there be no children nor their descendants, nor father, mother, brothers, sisters, nor descendants of deceased brothers or sisters, nor husband, nor wife living, then to the grandfather, grandmother, uncles, aunts, and their descendants, the descendants taking collectively the share of their immediate ancestors, in equal parts.

FOURTH: And if none of the relatives above enumerated be living, then to the nearest lineal ancestors and their descendants, the descendants collectively taking the share of their immediate ancestors, in equal parts. (L. '15, p. 498, Sec. 1; amending R. S. '08, Sec. 7040.)”